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No. 04-1140

IN THE

Supreme Court of the United States

GERALD T. and JUANA M. MARTIN, on behalf of themselves and all others similarly situated,

Petitioners,

v.

FRANKLIN CAPITAL CORPORATION, a Utah corporation, and CENTURY-NATIONAL INSURANCE COMPANY, a California corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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This brief is filed on behalf of the Product Liability Advisory Council, Inc. as *amicus curiae* in support of Respondents, with the written consent of the parties.[1]

INTEREST OF *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. ("PLAC") is a nonprofit corporation with more than 120 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers of products such as automobiles, aircraft, electronics, chemicals, pesticides, pharmaceuticals and medical devices.[2] PLAC's primary purpose is to file amicus curiae briefs in cases raising issues that affect the development of products liability law and that have the potential to affect PLAC's members. PLAC has submitted hundreds of amicus briefs in state and federal appellate courts, including this Court.

The members of PLAC have a significant interest in the principles relating to the removal of state court actions to federal courts. In recent years, PLAC members have been named as defendants in numerous state court actions, particularly in mass tort product liability cases. They have gained first-hand experience with devices used by the plaintiffs' bar in an effort to block defendants' removal of those actions to federal court based on diversity jurisdiction

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[1] Copies of those consents have been filed with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] A list of PLAC's current corporate membership is included as Appendix A to this brief.

under the provisions of 28 U.S.C. § 1441(a). PLAC's members have a particular interest in retaining the right to challenge plaintiffs' improper devices and strategies to block the appropriate exercise of defendants' statutory removal rights, without the threat of being sanctioned if they are not able to establish the impropriety of those devices and strategies.

SUMMARY OF ARGUMENT

Petitioners argue that this Court should adopt a novel standard, tilted toward plaintiffs, for implementing the costs and fees provision of the removal statute. This extraordinary approach – reading the word "may" in the statute to mean "shall" – is necessary, Petitioners claim, to carry out the intent of Congress, to fulfill the "large objectives" of the removal statute and to satisfy "equitable considerations." Respondents have already refuted Petitioners' arguments concerning Congress' intent in amending that provision of the removal statute. Respondents have also demonstrated that, to the extent the "large objectives" of the removal statute and "equitable considerations" bear upon the standard for awarding fees under that provision, those factors favor the party-neutral, multi-factor analysis applied by the lower courts in this case.

As to "large objectives," a central purpose of the removal statute since the dawn of the Republic has been to extend the protection of diversity jurisdiction to defendants sued outside their home state. Petitioners emphasize the purposes of the limitations on removal, but those limitations are subsidiary to this overriding objective of the statute: to provide a neutral forum to such defendants. To that end, this Court and the other federal courts have vigilantly protected

defendants against abusive practices by plaintiffs designed to frustrate the right of removal.

As to the appropriate equitable considerations in establishing a standard for fee awards, one of the most crucial is the development and proliferation of stratagems to manipulate federal jurisdiction and defeat defendants' removal rights. These devices are often difficult for defendants to overcome at the opening stages of a litigation. The law is often uncertain. The approaches of the lower courts vary. And the record is often undeveloped. But it is not improper for defendants to try, so long as they have a reasonable basis for such challenges. To over-deter them would be to reward manipulative conduct by some plaintiffs and to undercut the central goal of the removal statute. Equity is best served under these circumstances, not by adopting a rule tilted toward plaintiffs, but by leaving to the discretion of the district judge the determination, based on neutral factors, whether to award fees under the specific facts before the court. The most important factors in determining whether fees should be awarded should be the nature of the strategic obstacle to removal being challenged, the plaintiff's apparent intent in erecting the obstacle and the reasonableness of the defendants' challenge, even if unsuccessful.

As to the intent of Congress, there is no indication from any source that Congress intended to grant defendants removal rights while subjecting them to sanctions for reasonable, but unsuccessful efforts to exercise those rights.

ARGUMENT

I. THE OVERRIDING OBJECTIVE OF THE REMOVAL STATUTE IS TO EXTEND TO DEFENDANTS THE PROTECTION OF A NEUTRAL FORUM BASED ON DIVERSITY JURISDICTION AS AN ALTERNATIVE TO THE POTENTIALLY BIASED STATE COURT FORUMS SELECTED BY PLAINTIFFS

The Constitution provided for diversity jurisdiction of the federal courts, and the very first Congress implemented it in the Judiciary Act of 1789. As this Court explained just last Term, "the purpose of the diversity requirement . . . is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2618 (2005); *see also Walker v. Armco Steel Corp.*, 446 U.S. 740, 745 (1980) ("'[D]iversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State.'") (quoting *Erie R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938)); *United Steelworkers of Am., AFL-CIO v. R.H. Bouligny, Inc.*, 382 U.S. 145, 150 (1965) (Diversity jurisdiction provides "protection of the nonresident litigant from local prejudice."). The diversity jurisdiction clause also reflects a concern, of particular relevance to present-day suits against out-of-state corporations, "that state courts might discriminate against interstate businesses and commercial activities." It was therefore viewed "as a means of ensuring the protection of interstate commerce."[3]

[3] S. REP. No. 109-14, at 8 (2005) (report accompanying The Class Action Fairness Act of 2005). That report cited, among other scholars, Henry J. Friendly, subsequently an eminent judge of the (Cont'd)

Since first implementing the diversity jurisdiction authorized by Article III, Congress has also allowed defendants the right to remove to federal court certain cases brought against them in state courts. *See* Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80 (providing for removal when the amount in controversy exceeded $500 and the defendant was a citizen of a different state). Petitioners' rendition of the objectives of statutory removal rights is unbalanced and myopic. The overriding purpose of the creation of removal rights was to extend the protection of diversity jurisdiction to defendants. *See* Erwin Chemerinsky, FEDERAL JURISDICTION § 5.5 (4th ed. 2003). Because plaintiffs select the forum in the first instance, they do not need a right of removal to invoke diversity jurisdiction. Unless defendants could remove, diversity would protect *only* plaintiffs. Even wholly diverse out-of-state defendants would always be forced to litigate in the state courts of plaintiffs' choice. To be sure, defendants' removal rights are subject to limitations, but those limitations do not displace the overriding objective of the removal statute to provide such protection to defendants.

Accordingly, this Court has long been vigilant in protecting defendants' removal rights against abusive practices designed to frustrate those rights. *See, e.g., Powers v. Chesapeake & O. Ry. Co.*, 169 U.S. 92, 102 (1898) (in suit against diverse railway and non-diverse local employees, court permitted belated removal when employees were

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Second Circuit Court of Appeals. In an examination of the reasons for the grant of diversity jurisdiction, he found a "principal reason" to have been a "desire to protect creditors against [state] legislation favorable to debtors." Henry J. Friendly, The Historic Basis of Diversity Jurisdiction, 41 HARV. L. REV. 483, 496-97 (1928).

dismissed from the action at trial); *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 185 (1907) (ignoring non-diverse defendant's citizenship when joined for the purpose of preventing exercise of right of removal and without a factual basis); *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 98 (1921) (same). As this Court admonished nearly 100 years ago in *Wecker*, "the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction." 204 U.S. at 186.

There is, if anything, greater need for such vigilance now than in 1907. Indeed, the recent echoes in federal courts of *Wecker's* call for scrutiny reflect the increased salience of the concern. The Court of Appeals for the Fourth Circuit, for example, observed that "Congress created the removal process to protect defendants. It did not extend such protection with one hand, and with the other give plaintiffs a bag of tricks to overcome it." *McKinney v. Bd. of Trs. of Md. Cmty. Coll.*, 955 F.2d 924, 928 (4th Cir. 1992).[4] Congress recognized the need for protecting defendants' right to a neutral federal forum in interstate class action litigation earlier this year by its enactment of "The Class Action

[4] *See also Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 427 (5th Cir. 2003) ("Congress may have intended to limit diversity jurisdiction [by time limits reducing the opportunity for removal after substantial progress had been made in state court], but it did not intend to allow plaintiffs to circumvent it altogether."); *In re Diet Drugs Prods. Liab. Litig.*, 220 F. Supp. 2d 414, 425 (E.D. Pa. 2002) ("As long as Congress authorizes the federal district courts to exercise subject matter jurisdiction over diversity actions we must protect the right of parties to invoke it.").

Fairness Act of 2005." Pub. L. No. 109-2, 119 Stat. 4. That Act extended protection for defendants in such actions, following extensive hearings into plaintiffs' lawyers' "gam[ing]" procedural rules to keep interstate class actions in state courts. *See* S. REP. No. 109-14, at 4, 10. The same "gaming" occurs in non-class action litigation against interstate businesses, as discussed below. The explosion of mass tort litigation has increased defendants' need for a neutral federal forum.

II. A REMOVAL BASED ON REASONABLE, BUT ULTIMATELY UNSUCCESSFUL, GROUNDS DOES NOT, WITHOUT MORE, JUSTIFY SANCTIONS

Petitioners assume that a remand of a removed case means the defendant somehow acted improperly or contravened Congress's intent in removing the case, even if the removal rested on reasonable grounds. *See* Pet. Br. at § IV.A. Not only is that assertion unfounded, but it also would subvert the central function of the removal statutes. As the American Law Institute recently stated, "[c]urrent law invites contrivance to frustrate defendants' legitimate rights of removal by a variety of stratagems . . . ." American Law Institute, FEDERAL JUDICIAL CODE REVISION PROJECT 466 (2004). We discuss below a sample of some of those contrivances and the challenges they pose to the appropriate exercise of removal rights. Even these few samples, however, demonstrate that Petitioners' interpretation of the fee award provision of the removal statute would vitiate the removal rights that Congress granted.[5]

[5] These examples are drawn primarily from diversity jurisdiction removals, because removals on that basis arise most often in product

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A. Plaintiffs Are Devising Novel Strategies to Block Removal and Defendants Are Responding Appropriately by Urging the Courts to Evolve Existing Principles to Address Those New Strategies

Petitioners argue that defendants should not remove cases based on "novel contentions." If that were the rule, however, defendants could not respond to new strategies to block their right of removal. The law is not static. As Justice Holmes observed, the life of the law is experience. Legal standards must adapt to the innovations of thousands of practitioners plying their ingenuity on behalf of their clients. Not only is there nothing improper in defendants' urging courts to extend established principles to plaintiffs' latest devices to block removal, such advocacy is essential. As this Court explained more than 100 years ago, it is sometimes necessary for the court to develop new interpretations of removal law to "prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control." *Powers*, 169 U.S. at 100.

One example of such a new device used in mass tort cases to block federal court jurisdiction is the filing of mass complaints, joining – or more aptly misjoining – numerous plaintiffs diverse from defendants, whose claims could therefore be removed to federal court if filed individually, with at least one plaintiff who is not diverse from at least

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liability litigation. We do not mean to suggest that there are not similar issues arising in connection with removals based on federal question jurisdiction.

one defendant. This device multiplies the effect on removability of one non-diverse plaintiff, using that lack of diversity to insulate potentially thousands of other plaintiffs against removal. *See Allapattah*, 125 S. Ct. at 2617 (diversity jurisdiction requires that all plaintiffs be diverse from all defendants). In product liability litigation involving silica, for example, up to 4,280 plaintiffs joined in a single complaint filed in a Mississippi state court, with at least one plaintiff having the same citizenship as at least one defendant. *See In re Silica Prods. Liab. Litig.*, 2005 WL 1593936, at *74-*75 (S.D. Tex. June 30, 2005). In product liability litigation involving the diet drugs sometimes known as "fen-phen," 168 cases were filed in a Georgia municipal court on behalf of more than 14,000 plaintiffs residing throughout the nation. In each case, only one or two plaintiffs were Georgia residents and no more than a handful of plaintiffs lacked citizenship diverse from that of any defendant. *See In re Fen-Phen Litig.*, No. 1:03-MD-1-RLV, slip op. at 2 (N.D. Ga. Oct. 15, 2003).[6] In response to this new strategy, defendants have properly argued that plaintiffs have invented a new form of fraudulent joinder, just as inappropriate as plaintiffs' fraudulently joining non-diverse defendants against whom plaintiffs have no intention of seeking a recovery or no valid claim. *See Chicago, Rock Island, & Pac. Ry. Co. v. Schwyhart*, 227 U.S. 184, 194 (1913) ("fraudulent joinder" of a defendant is found either when there is no real intention to get a joint judgment or when there is no colorable ground for such a judgment).

A number of courts have accepted that argument, and this removal-blocking device has come to be known as

[6] Unpublished decisions cited in this brief will be provided upon the request of the Court.

"fraudulent misjoinder."[7] Not every court, however, has recognized this device as a form of fraudulent joinder. *See, e.g., In re Benjamin Moore & Co.*, 309 F.3d 296, 298 (5th Cir. 2002) (district court had remanded case despite fraudulent misjoinder claim; Court of Appeals agreed with defendants that "it might be concluded that misjoinder of plaintiffs should not be allowed to defeat diversity jurisdiction," but the Court was without jurisdiction to overturn district court). Even courts which accept the general proposition that joinder of plaintiffs may constitute a form of fraudulent joinder differ as to the standard to apply in evaluating such a claim. *Compare, e.g., Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996) (requiring "egregious" misjoinder for finding of fraudulent misjoinder), *with In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d at 147-48 (rejecting requirement of "egregiousness"); *compare Koch v. PLM Int'l, Inc.*, 1997 WL 907917, at *3 (S.D. Ala. Sept. 24, 1997) (applying federal joinder rules), *with In re Diet Drugs Prods. Liab. Litig.*, 294 F. Supp. 2d at 678-79

[7] *See, e.g., In re Silica Prods. Liab. Litig.*, 2005 WL 1593936, at *75 (finding that each plaintiff's claim should be considered in evaluating federal jurisdiction as if that claim had been severed from all the other plaintiffs' claims); *Coleman v. Conseco, Inc.*, 238 F. Supp. 2d 804, 818 (S.D. Miss. 2002) (finding that 48 plaintiffs, only 3 of whom were non-diverse from defendants, were fraudulently misjoined and remanding only those 3 plaintiffs' claims to state court); *In re Diet Drugs Prods. Liab. Litig.*, 294 F. Supp. 2d 667, 677-79 (E.D. Pa. 2003) (finding fraudulent misjoinder in six Georgia cases, each having one Georgia non-diverse plaintiff and numerous out-of-state and diverse plaintiffs); *In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d 136, 146-47 (S.D.N.Y. 2001) (finding fraudulent misjoinder of plaintiffs because only some of multiple plaintiffs had valid claims against non-diverse defendants); *In re Fen-Phen Litig.*, slip op. at 3 (finding fraudulent misjoinder of more than 14,000 plaintiffs).

(applying state joinder rules). In the Eleventh Circuit, moreover, where an element of "egregiousness" is required for a finding of fraudulent misjoinder, the courts have not yet defined what conduct would be considered sufficiently "egregious" for that purpose.

Particularly in connection with such a newly evolving principle of law, where the boundaries and even the direction are unclear, where the standards vary from jurisdiction to jurisdiction, defendants must have room for reasonable advocacy, even if they are unsuccessful in convincing a particular court of their position. As with any effort to extend established principles to new circumstances, defendants will not always be successful in challenging this improper device. But that does not make those efforts improper, and the Court should not chill them.

Another example of plaintiffs' new anti-removal tactics also came to light in the "fen-phen" litigation. The court assigned the multidistrict litigation found substantial evidence that some defendants had colluded with the plaintiffs' bar to deny the principal defendant its statutory removal rights. *See In re Diet Drugs Prods. Liab. Litig.*, 220 F. Supp. 2d at 420-22. The colluding defendants had refused to grant required consents to the principal defendant's removals in hundreds or thousands of cases. *See id.* Without those consents, the principal defendants' removals were blocked.[8] In return, plaintiffs ultimately dismissed those co-defendants. However, the evidence of such collusion took years to uncover. Surely, a defendant in such circumstances should not be sanctioned for challenging such collusion, even if the defendant fails to convince a court of the collusion.

[8] Courts have interpreted 28 U.S.C. § 1446(b) to require that all defendants join in or consent to removal. *See, e.g., Johnson v. Helmerich & Payne, Inc.*, 892 F.2d 422, 423 (5th Cir. 1990).

B. Uncertainties Arising from the Time Limits in the Removal Statute Are Another Reason Defendants Must Have the Latitude to Advance Reasonable Arguments

In order that the case not proceed wastefully in state court for too long prior to removal, Congress imposed time limits on defendants' removal rights. A defendant must remove a state court case within 30 days after service. 28 U.S.C. § 1446(b). However,

> [i]f the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant . . . of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of [diversity] jurisdiction . . . more than 1 year after commencement of the action.

Id. Working within these time limits creates significant uncertainties for defendants.

A defendant having reason to believe there is fraudulent joinder but possessing incomplete evidence to that effect at the outset of the case faces a practical dilemma. If the defendant removes the case at the outset based on the limited facts then available, it risks remand for failure to meet the significant burden of demonstrating fraudulent joinder at that time. On the other hand, if the defendant does not remove

the case within the first 30 days, but does so later based on additional facts obtained in discovery, it risks an objection that the removal is untimely, that there were sufficient facts available at the outset to have supported the grounds on which the defendant subsequently removed the case. The same type of dilemma arises as the facts emerge in discovery. As developing evidence increasingly suggests fraudulent joinder, the defendant will have to make a judgment when it is first ascertainable that the case has become removable. As part of that assessment, the defendant will also need to weigh whether the evidence is yet sufficient to meet the defendant's burden of establishing fraudulent joinder. When these judgment calls are reasonable, but a federal court ultimately disagrees and finds the defendant removed either too early or too late, it would be inequitable to subject the defendant to sanctions.

Moreover, plaintiffs are well aware of the statutory time limits and often act in a manner designed inequitably to prevent defendants from removing on a timely basis. Defendants may properly challenge those tactics as inequitable. For example, in *Tedford v. Warner-Lambert Co.*, plaintiff sued a non-diverse prescribing physician along with an out-of-state drug manufacturer but signed a dismissal of the claim against the physician. However, the plaintiff did not disclose that dismissal to the manufacturer until the one-year time limit for removal had passed. When removing the case, the manufacturer successfully argued as a matter of equity that the one-year deadline should be tolled because of plaintiffs' manipulation. The court agreed. *See* 327 F.3d at 426-27; *see also, e.g., Doe v. Kerwood*, 969 F.2d 165, 169 (5th Cir. 1992) (recognizing equitable power of the court to consider exceptions to the statutory 30-day limit on removal);

Staples v. Joseph Morton Co., 444 F. Supp. 1312, 1313-14 (E.D.N.Y. 1978) (plaintiff estopped from moving to remand when he induced defendant to refrain from removing on a timely basis). However, the courts are split on whether such equitable tolling applies and it is in any event not clear what conduct triggers an equitable exception to the statutory time periods. *See, e.g.*, cases cited in *Tedford*, 327 F.3d at 426 n.4. It would be unfair and contrary to the central purposes of the removal statute to put a defendant at high risk of sanctions in order to find out the answer to this legal question in a particular jurisdiction.

C. Defendants Also Must Have the Latitude to Make Reasonable Arguments Given the Uncertainties in Seeking to Establish Fraudulent Joinder

Plaintiffs suing out-of-state defendants have not only developed new stratagems to block removal but have continued to use the older tactic of joining non-diverse defendants with no intention of pursuing a judgment or no colorable claim against the them. It is a common practice, for example, for mass tort plaintiffs suing out-of-state corporate defendants in state court to name as a co-defendant a low-level corporate employee living in that state or a local distributor of the product in question, merely to keep the case in state court and without any interest in seeking a judgment against the co-defendant. If the corporate defendant has reason to believe, as a legal or factual matter, that the local defendant is fraudulently joined, it is entirely appropriate to challenge that device. Proving fraudulent joinder, however, is often a difficult challenge for defendants. They face uncertainties even as to the procedures the district court will employ in resolving such a claim.

This phenomenon is demonstrated by the predicament of the Bankston Drugstore in rural Fayette, Mississippi, which was sued in hundreds of cases filed there and was later usually dropped from the suit. It was no secret to the courts or the parties that the only reason Bankston Drugstore was being sued was to keep the case in state court. Establishing that proposition was no simple matter, however. One court, relying on the testimony of the owner of that pharmacy before the House Judiciary Committee, explained the situation as follows:

> As the only pharmacy in Jefferson County, Mississippi, the store is named in hundreds of lawsuits involving the sale of allegedly defective drugs, including fen-phen. Hilda Bankston, the former owner of the pharmacy, testified [before the House Judiciary Committee] that because of this "lawsuit frenzy" she has had to spend innumerable hours retrieving information for potential plaintiffs, testifying in court, enduring the whispers and questions of customers and neighbors who wonder what the pharmacy did to end up in court so often, and worrying about whether her business would survive. . . . Although the pharmacy is usually dropped from the lawsuits, the costs of hiring lawyers and obtaining insurance can become prohibitive. As Ms. Bankston sees it, her "life's work was merely a means to an end for trial lawyers seeking to cash in on lucrative class actions – a back door into the Jefferson County court system."

In re Diet Drugs Prods. Liab. Litig., 220 F. Supp. 2d at 424 (internal citations omitted).

Defendants could challenge such a removal-blocking strategy by showing that the plaintiff had no good faith intention of pursuing the non-diverse defendant to judgment. *See, e.g.*, *Wilson*, 257 U.S. at 98; *Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1291 (11th Cir. 1998); *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990). But proving the plaintiff's intent in bringing a lawsuit is rarely a certainty for a defendant considering removal. In rare cases, there might be direct evidence of intent. *See*, *e.g.*, *Mask v. Chrysler Corp.*, 825 F. Supp. 285, 286-87 (N.D. Ala. 1993) (plaintiff's counsel sent letter to non-diverse automobile dealership defendant joined in suit against manufacturer, stating that plaintiff did not intend to pursue the dealership to judgment); *Heimback v. A.H. Robins Co., Inc.*, No. 02-0347-S-BLW, slip op. at 2-3 (D. Id. Nov. 14, 2002) (non-diverse physician-defendant testified that patient-plaintiff had assured him that physician was joined in suit against drug manufacturer only to keep the case in state court). In other cases, a defendant might only have circumstantial evidence. By the very nature of such evidence, however, a defendant is always uncertain at the time of removal whether or not it will be able to prevail in establishing a lack of intent on that basis. *See*, *e.g.*, *Parnas v. Gen. Motors Corp.*, 879 F. Supp. 91, 94 (E.D. Mo. 1995) (evidence insufficient to demonstrate lack of intent); *Franz v. Wyeth*, No. H-04-0169, slip op. at 6-13 (S.D. Tex. Apr. 26, 2004) (proposed plaintiff agreement to dismiss non-diverse defendant if diverse defendant would agree not to remove case was insufficient evidence of lack of intent to pursue non-diverse defendant to judgment).

An alternative to proving a lack of intent to pursue the defendant would be to demonstrate that there is no reasonable possibility of plaintiff's establishing a claim against the non-diverse defendant. If the law governing liability is uncertain,

however, the courts will give the plaintiff the benefit of the doubt in ruling on a fraudulent joinder challenge to the claim against that defendant. *See*, *e.g.*, *Crowe v. Coleman*, 113 F.3d 1536, 1540 (11th Cir. 1997); *Boyer*, 913 F.2d at 111; *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981).

In some cases, plaintiffs' strategy for defeating removal is to make factual allegations in their complaint sufficient on their face to state a claim against a non-diverse defendant, even when no valid claim exists as a factual matter. *See*, *e.g.*, *In re Diet Drugs Prods. Liab. Litig.*, 220 F. Supp. 2d at 422 (50 plaintiffs sued Dr. Seymour Hersh alleging that he had prescribed a drug to them, even though the evidence showed that none of the plaintiffs had been treated by or had had any contact whatever with Dr. Hersh); *In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d at 138-141 (non-diverse field sales representative joined in suit against drug manufacturer under state law requiring sale of the drug for liability, despite evidence that the representative had never sold the drug).

Defendants face uncertainty, however, as to how far the district court will permit them to go in introducing evidence to establish that there is no colorable claim against the non-diverse defendant. First, courts differ, even within the same circuit, as to whether their review of a fraudulent joinder claim is limited to the allegations of the complaint or whether they may consider evidence proffered by the parties. *See*, *e.g.*, *Pacheco de Perez v. AT&T Co.*, 139 F.2d 1368, 1380 (11th Cir. 1998) (fraudulent joinder determination to be made based on complaint supplemented by any affidavits and deposition transcripts); *Johnson v. Wyeth*, No. 1:02-CV-1368-TNT (N.D. Ga. Jan. 3, 2003) (determining fraudulent

joinder based in part on deposition transcripts); *Hales v. Merck & Co., Inc.*, No. 03-AR-1028-M, slip op. at 6-7 (N.D. Ala. June 26, 2003) (court would not consider non-diverse defendants' affidavits in deciding fraudulent joinder); *Legg v. Wyeth*, No. CV-04-S-0435-NE, slip op. at 10 (N.D. Ala. Apr. 27, 2004) (refusing to consider non-diverse field sales representative defendant's affidavit that she had never promoted or had anything else to do with the drug in question); *see also Reeb v. Wal-Mart Stores, Inc.*, 902 F. Supp. 185, 187-88 (E.D. Mo. 1995) (discussing the split of authority in the Eighth Circuit on whether or not to permit "piercing of the pleadings" in evaluating fraudulent joinder).

Even within a single judicial district, judges' divergent views of the limitations on piercing the pleadings can lead to different decisions based on substantially identical facts. *Compare, e.g., Clay v. Wyeth*, No. 5:04-cv-192-Oc-10GRJ, slip op. at 28 (M.D. Fla. Sept. 23, 2004) (Hodges, J.) (finding that pharmacy and drug company sales representatives were fraudulently joined because the affidavits and other evidence submitted by the parties established that there was no reasonable basis for the claims against these defendants), *with Hroncich v. Wyeth*, No. 2:03-cv-659-FTM-29SPC, slip op. at 3-4 (M.D. Fla. Jan. 12, 2004) (Steele, J.) (refusing to go beyond allegations of complaint and remanding case that involved similar facts and evidence and the same types of non-diverse defendants as in *Clay*).

Courts that permit some piercing of the pleadings, moreover, often limit the factual issues they will consider. *See, e.g., B., Inc.*, 663 F.2d at 551 ("The question of whether the plaintiff has set forth a valid claim against the in-state defendant(s) should be capable of summary determination.");

Crowe, 113 F.3d at 1541-42 (district court is to stop short of adjudicating the merits of the case); *Boyer*, 913 F.2d at 112 (recognizing uncertainty as to extent of permissible inquiry into the validity of the claim).

Particularly under these circumstances, it would be inequitable and contrary to the central purpose of the removal statute for plaintiffs' legal fees to be imposed on a defendant merely because it is unsuccessful in establishing fraudulent joinder in a particular case.

III. CONGRESS DID NOT INTEND TO GRANT HOLLOW REMOVAL RIGHTS, SUBJECTING DEFENDANTS TO SANCTIONS IF THEY ARE UNSUCCESSFUL IN OVERCOMING PLAINTIFFS' STRATAGEMS

The foregoing discussion includes only some examples of the uncertainties facing many defendants considering removing a case against them filed in state court. Plaintiffs suing out-of-state corporations have many devices available to frustrate defendants' exercise of their right to seek the neutral forum provided by the federal court. Defendants cannot always be successful in challenging those devices in the face of the uncertainties discussed above. But there is no indication in the removal statute, its legislative history or its "large objectives" that Congress intended to require defendants who acted reasonably nonetheless to pay the plaintiffs' legal fees whenever defendants are unsuccessful in upholding a removal. To the contrary, these factors weigh heavily in favor of the type of multi-factor, party-neutral standard employed by the Court of Appeals in this case. When "equitable considerations" are added to the mix, there can be no question that the equities overwhelmingly favor this Court's affirming the application of that type of standard.

CONCLUSION

For the foregoing reasons, the Court should affirm the Tenth Circuit's ruling as to the standards for determining an award of costs and fees under 28 U.S.C. § 1447(c) and as to the decision in this case.

Respectfully submitted,

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APPENDIX A: CORPORATE MEMBERS OF THE PRODUCT LIABILITY ADVISORY COUNCIL

3M
Altec Industries
Altria Corporate Services, Inc.
American Household, Inc.
American Suzuki Motor Corporation
Amgen Inc.
Andersen Corporation
Anheuser-Busch Companies
Appleton Papers, Inc.
Arai Helmet, Ltd.
Astec Industries
Aventis Pharmaceuticals, Inc.
BASF Corporation
Bayer Corporation
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc
Briggs & Stratton Corporation
Bristol-Myers Squibb Company
Brown-Forman Corporation
CARQUEST Corporation
Caterpillar Inc.
Chevron Corporation
Continental Tire North America, Inc.

Appendix A

Cooper Tire and Rubber Company
Coors Brewing Company
Crown Equipment Corporation
DaimlerChrysler Corporation
Deere & Company
The Dow Chemical Company
E & J Gallo Winery
E.I. DuPont De Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
Freightliner LLC
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Guidant Corporation
Harley-Davidson Motor Company
The Heil Company
Honda North America, Inc.
Hyundai Motor America
ICON Health & Fitness, Inc.
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Johnson & Johnson
Johnson Controls, Inc.

Appendix A

Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Kraft Foods North America, Inc.
Lincoln Electric Company
Masco Corporation
Mazda (North America), Inc.
McNeilus Truck and Manufacturing, Inc.
Medtronic, Inc.
Mercedes-Benz of North America, Inc.
Michelin North America, Inc.
Miller Brewing Company
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Consumer Health, Inc.
Novartis Pharmaceuticals Corporation
Occidental Petroleum Corporation
PACCAR Inc
Panasonic
Pentair, Inc.
Pfizer Inc.
Pharmacia Corporation
Porsche Cars North America, Inc.
PPG Industries, Inc.
Purdue Pharma L.P.
Putsch GmbH & Co.KG
The Raymond Corporation

Appendix A

Raytheon Aircraft Company
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Sturm, Ruger & Company, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Terex Corporation
Textron, Inc.
Thomas Built Buses, Inc.
TK Holdings
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Automotive US LLC
Tyson Foods, Inc.
UST (U.S. Tobacco)
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Water Bonnet Manufacturing, Inc.
Watts Water Technologies, Inc.
Whirlpool Corporation
Wyeth
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.